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**JUL 25 2011**

**OFFICE OF PETITIONS**

GEORGE S. COLE, ESQ.  
495 SEAPORT COURT, SUITE 101  
REDWOOD CITY CA 94063

In re Application of

Roarty

ON PETITION

Application No. 10/797,255

Filing Date: March 10, 2004

This is in response to the petition to withdraw the holding of abandonment under 37 CFR 1.181(a), filed April 29, 2011. This is also a decision on the petitions under 37 CFR 1.137(a) and 37 CFR 1.137(b) filed in the alternative on April 29, 2011.

The petition to withdraw the holding of abandonment is **granted**.

The petition under 37 CFR 1.137(a) is **dismissed as moot**.

The petition under 37 CFR 1.137(b) is **dismissed as moot**.

This application became abandoned for failure to respond in a timely manner to the Notice of Non-Compliant Amendment (the "Notice") mailed May 10, 2010. The notice allowed a period for reply of one month from its mailing date. Extensions of the time set for reply were available pursuant to 37 CFR 1.136. No reply was received within the allowable period, and the application became abandoned on June 11, 2010. A Notice of Abandonment was mailed April 6, 2011.

**TREATMENT UNDER 37 CFR 1.181**

When, as in this case petitioner is arguing that an Office communication was not received, petitioner must establish non-receipt of the Office communication in accordance with section 711.03(c) of the *Manual of Patent Examining Procedure* that requires the following:

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner *should so state* and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

Petitioner has met the burden of proof as established by Section 711.03(c)(II) of the MPEP. The holding of abandonment is, therefore, withdrawn.

It is noted that petitioner makes some argument that the reply filed January 19, 2010, was complete and that the Notice of Non-Compliant Amendment was issued in error. No consideration is giving to this argument. Applicant is not a liberty to ignore a requirement made in the Notice of Non-Compliant Amendment regardless of whether applicant believes the requirement to be incorrect. Applicant was obligated to file a timely response to the Notice to the Notice of Non-Compliant Amendment or file a request to restart or reset the time period for responding to the Notice to the Notice of Non-Compliant Amendment because it was allegedly defective. See MPEP 710.06. Section 711.02 of the Manual of Patent Examining Procedure, citing 37 CFR 1.135(a) states, in pertinent part, that, "...an application becomes abandoned if applicant "fails to reply" to an office action within the fixed statutory period. This failure may result either from (A) failure to reply within the statutory period, or (B) insufficiency of reply, i.e., failure to file a "complete and proper reply, as the condition of the case may require" within the statutory period ( 37 CFR 1.135(b)).” Thus, the petition to withdraw the holding of abandonment is being granted on the basis of applicant having established that the Notice of Non-Compliant Amendment was not received, not on the assertion of the applicant that the Notice of Non-Compliant Amendment was improper.

#### **TREATMENT UNDER 37 CFR 1.137(a)**

As the holding of abandonment is being withdrawn pursuant to 37 CFR 1.181, there is no relief that can be obtained pursuant to 37 CFR 1.137(a). The petition is dismissed as moot, accordingly. The amount of \$270.00 will be refunded, in due course.

#### **TREATMENT UNDER 37 CFR 1.137(b)**

As the holding of abandonment is being withdrawn pursuant to 37 CFR 1.181, there is no relief that can be obtained pursuant to 37 CFR 1.137(b). The petition is dismissed as moot, accordingly. The amount of \$810.00 will be refunded, in due course.

It is noted that marked-up claims listing was filed April 29, 2011.

The application is being directed to Technology Center GAU 3663 for further processing which may include processing of the response filed April 29, 2011, or re-mailing of the Notice of Non-Compliant Amendment in view of applicant's non-receipt of the same.

Telephone inquiries concerning this decision should be directed to the undersigned (571) 272-3222.

/Kenya A. McLaughlin/

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